

THE STATE OF CONNECTICUT
JOINT COMMITTEE ON GOVERNMENT ADMINISTRATION AND ELECTIONS

*HB 5126: An Act Concerning an Agreement Among the States to Elect the
President of the United States by National Popular Vote*
February 24, 2014

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College*

Overview

I urge you to vote against HB 5126. It would create many new logistical and legal problems for our presidential election process. It would also effectively eliminate the Electoral College, an institution that protects small to mid-sized states such as Connecticut and is critical to the success of our republican democracy.

Problems Created by HB 5126.

- Differing States' Laws. NPV attempts to combine 51 different state (and D.C.) election processes together to obtain one national outcome. This will not work. Chaos, litigation, and confusion will result. One of the three constitutional lawyers who originally proposed an NPV-like mechanism has conceded this difficulty.
- Disenfranchised Voters. Some voters may be disenfranchised because their votes will be counted in different ways, depending on their state of residence.
- Legal Issues. NPV's plan has other constitutional and legal problems, which will be the subject of much litigation.
- Amendment Necessary. The Electoral College should not be eliminated, but if it must be, then a constitutional amendment is necessary.

Modern Benefits of the Electoral College

- The Benefits of Federalism. Presidential candidates must build national coalitions of voters. Historically speaking, the candidate who builds the broadest coalition will win. Thus, presidents are good representatives for all Americans; they do not merely represent one region, state, or special interest group.
- Moderation and Compromise. The Electoral College encourages Americans to work together, across state lines. A direct election system, by contrast, would result in multi-party presidential races, a fractured electorate, increasingly extremist third-party candidates, and constant recounts.
- Stability and Certainty in Elections. The Electoral College typically produces quick and undisputed outcomes. Any problems are isolated to one or a handful of states. Fraud is minimized because it is hard to predict where stolen votes will matter.

Conclusion. The Electoral College should not be eliminated through legislation such as HB 5126. The system protects our freedom, just as it did when it was created in 1787.

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Full Testimony

HB 5126 represents the latest attempt to eliminate America's unique and successful presidential system. Abolishing the Electoral College would be unhealthy for the country and especially detrimental for small to mid-sized states such as Connecticut. But eliminating the Electoral College through this roundabout manner, without going through a formal constitutional amendment process, carries its own special dangers.

First, I will discuss the special legal and logistical difficulties created by NPV's plan. Second, I will discuss the benefits that the Electoral College still provides today.

Problems Created by NPV

The current presidential election process blends federalist and democratic principles. America holds 51 completely separate, purely democratic elections each presidential election year (each state, plus D.C.). Each state is responsible for holding its own, independent election to determine which electors will represent it in the Electoral College vote. Differences among states' laws are irrelevant because votes cast in one state do not impact the outcome in another state. In short: 51 elections are held; 51 sets of state election laws govern these elections; 51 outcomes are achieved. Everyone is treated fairly.

NPV would change this. America would still hold 51 state-level elections, governed by 51 sets of election laws. But NPV would attempt to derive only one outcome from these 51 processes. Suddenly, variances among states' laws—previously irrelevant—would matter a great deal. **Now these varying laws ensure unequal treatment of voters.**

Consider the issue of early voting. Voters in Connecticut have their own laws regarding early voting. Other states might have different provisions regarding when early voting starts, how long it lasts, or who may early vote and how they may early vote. If Connecticut's voters are competing only against other Connecticut voters in a contest to determine the identity of Connecticut's electors, then they have no reason to care what the rules are in another state. Ballots cast in other states do not affect the identity of a Connecticut elector. However, once NPV throws voters of all states into the same election pool, then many problems begin to arise. **With NPV in place, the identity of a Connecticut elector could be changed by a vote cast in Minnesota or Alaska or any other state.** How can Connecticut voters be equal with those in Minnesota if they have less time to vote? Or if it is harder to obtain an absentee ballot?

There are many other differences among states' laws: States differ in whether they allow felons to vote. They differ in their requirements for ballot qualification. States have different criteria for what does (or does not) trigger recounts within their borders. These differences could cause a whole host of problems. What if the national total is close—close enough to warrant a recount—but a recount can't be conducted because the margins in individual states were not close? Or perhaps recounts are conducted, but only in two or three states, each with a different idea of how to count a hanging chad. Perhaps other states see what is going on and choose to conduct recounts that their statutes previously deemed optional. They have different definitions of "hanging chad," and they want to counteract the efforts of other states.

One well-respected constitutional lawyer, Prof. Vikram David Amar, has acknowledged the real dangers created by these issues. Amar's opinion is important: NPV is based upon an idea that he and two other professors proposed in 2001. Yet Amar notes that a "problem I see in the current National Popular Vote bill is that it does not guarantee a true national election with uniform voter qualification, voter mechanics, and vote-counting standards. Absent such uniformity, some states might have incentives to obstruct or manipulate vote counts."

Additional problems are created by the fact that NPV gives the presidency to the candidate winning *any* plurality. NPV is not looking for a majority winner. It is not even looking for a minimum plurality. Thus, a candidate could win with only 15 or 20 percent of votes nationwide.

Such an idea sounds far-fetched today, with America's two-party system firmly in place. But if elimination of the Electoral College undermines the two-party system, as many believe it will, then such results are entirely possible.

But it gets even worse. Under this scheme, Connecticut could be forced to award its entire slate of electors to a candidate who was not on its ballot. By the terms of the NPV compact, this candidate could be entitled to personally appoint the seven electors who will represent Connecticut in the Electoral College vote. He could even appoint people from out-of-state, if he thought they were more likely to be faithful to him in the Electoral College vote.

Finally, remember that NPV's compact is a temporary solution—easy to join and unjoin, by its own terms—as opposed to a constitutional amendment, which would be a relatively permanent solution. Imagine that NPV has just enough states to be operable during the 2012 election. The presidential campaigns are proceeding on the assumption that a national direct election will be in place on Election Day. But in late June, Massachusetts gets worried that the Republican will win the national popular vote. In disgust, its legislature decides to pull out of NPV's compact. Suddenly, NPV no longer has enough states to proceed. The country is again hosting a normal presidential election with the Electoral College in place. Well, unless some other state changes its mind and swiftly adopts NPV for purely political, partisan reasons.

This kind of flip-flopping back and forth is not good for the stability of the country or its presidential election system.

There are many other legal and constitutional issues created by NPV's compact: Is its interstate compact an illegal end-run around the constitutional amendment process? Will the compact require congressional approval? Does NPV's entire scheme fail under Court precedents such as *U.S. Term Limits, Inc. v. Thornton* and *Clinton v. New York*? Does the compact create Equal Protection issues because of the unequal treatment of voters? Reasonable legal arguments can be made for any of these positions, and they will doubtless be litigated at length. Such extended litigation is harmful to the stability of our political system—to say the least.

Formally eliminating the Electoral College through a constitutional amendment would be unhealthy for the country. But NPV's attempt to skirt the constitutional amendment process altogether would create added difficulties. These logistical and legal nightmares could haunt the country each and every presidential election year.

The Benefits of the Electoral College

I do not mean to imply that the only problem with NPV is its logistical difficulties. Eliminating the Electoral College would do serious harm to a country as diverse as our own. The history of the Electoral College must be understood if its benefits are to be appreciated.

The Founders' Constitution seeks to reconcile two seemingly irreconcilable goals: They wanted the people to govern themselves, but they also wanted to protect minority interests. A pure democracy would not accomplish this objective: It allows 51 percent of the people to rule the other 49 percent—all the time, without exception. If America were a pure democracy, imagine what could happen in the wake of an event like 9/11. A bare majority could enact any law it desired, even if that law were tyrannical, racist, or penalized religious beliefs. Thus, the Constitution combines democracy with republicanism and federalism. Safeguards such as the Senate (one state, one vote), supermajority requirements to amend the Constitution, and the Electoral College allow the majority to rule, but only while it acts reasonably. Minority political interests are protected.

The Benefits of Federalism

Electoral College opponents argue that presidential elections are undemocratic. They are wrong. America holds 51 purely democratic elections each presidential election year (each state, plus D.C.). Such a process combines democracy and federalism into one process. The result is that candidates can't win without nationwide support. Obama can't rely solely on big cities in California. Republicans can't rely solely on Texas. They must win simultaneous, concurrent majorities nationwide. They can't achieve those victories unless they reach out to a wide variety of voters. They will fail if they rely upon isolated pockets of support in one region or among voters in one special interest group.

Many dispute that our system creates national coalition-building, arguing that it instead causes a disproportionate focus on mid-sized "swing" states. These arguments appear true if we focus on one or a handful of election years in isolation. But if we look at the states' full histories of voting, we see that the identity of "swing" and "safe" states changes all the time. California is often viewed as irreversibly Democrat, but it voted for Republican candidate George H.W. Bush as recently as 1988. Texas used to be as undeniably Democrat as it is Republican today.

States such as Georgia, Kentucky, and Louisiana all voted for Bill Clinton in the 1990s, but they were considered very safe Republican states in 2008.

Ultimately, the Electoral College ensures that the political parties must reach out to all the states. As a matter of history, no political party has ever been able to ignore any state for too long without feeling the ramifications at the polls.

Moderation and Compromise

The most likely consequence of a change to a direct popular vote is the breakdown of the two-party system. Today, third-party candidates do not receive much support. In a direct popular election, everything changes. A vote for Ross Perot or Ralph Nader is no longer "wasted," and the number of presidential candidates would increase. Voters would fracture their votes across many candidates. The result will be lower vote totals per candidate and an increased likelihood that two or more candidates will have close popular vote totals. Recounts would proliferate. Worse, extremist candidates could more easily sway an election, because no candidate is required to obtain majority support.

NPV proponents argue that the President should have the support of most Americans. But in real life, "most" Americans will never agree on their ideal candidate. Individuals' opinions differ too greatly. Given the general inability to obtain majority consensus (or even the consensus of a large plurality), the Electoral College provides the country with the next best alternative. Electing Presidents by states' electoral votes, rather than individuals' votes, creates a method of electing a President who is a good compromise candidate for most Americans, as represented by their states. The Electoral College requires moderation, compromise, and coalition-building from any candidate before he can be successful.

Stability and Certainty in Elections.

The Electoral College encourages stability and certainty in our political system. Events such as those that occurred in 2000 are rare. The Electoral College typically produces quick and undisputed election outcomes for two reasons: First, the system (along with the winner-take-all rule) tends to magnify the margin of victory, giving the victor a certain and demonstrable election outcome. Such certainty can't be provided by a direct popular election. Popular votes are often close, and these close votes can result in constant litigation and recounts. Second, the system controls the impact of fraud and error. In part, this is because it is difficult to predict where stolen votes will make a difference to the national outcome. But if one person can identify a problematic state (think Ohio in 2004), then, in all likelihood, everyone knows and that area is closely watched. It becomes harder to steal votes. To the degree that fraud and errors do occur, the Electoral College makes it possible to isolate the problem to one or a handful of states. The country is given a clear set of problems to resolve one way or another before moving on to a definitive election outcome.

Conclusion

The Electoral College is an important safeguard in our constitutional system of checks and balances, and it is critical to the success of our nation's republican democracy. I urge you to protect the Electoral College by voting "no" on HB 5126.

